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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 844

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* VINCENT MUMMIANI,

Petitioner,

against

J. VERNEL JACKSON, etc., *et al.*, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT, CLINTON COUNTY, STATE OF NEW YORK.

VINCENT MUMMIANI,
Petitioner in pro. per.,
Post Office Address,
Box B, Clinton Prison,
Dannemora, New York.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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OCTOBER TERM, 1946.

No. .....

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* VINCENT MUMMIANI,

Petitioner,

against

J. VERNEL JACKSON, etc., *et al.*, as Warden of Clinton Prison at Dannemora, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT, CLINTON COUNTY, STATE OF NEW YORK.

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States.

United States of America,
State of New York, } ss.:
County of Clinton.

VINCENT MUMMIANI, being duly sworn, deposes and says; that he is the petitioner above named and asks leave

NOTE: Arabic numbers refer to pages of papers had on appeal in the court below; and exhibits herein referred to are made a part hereof.

of the Court to file this petition in his own behalf, without argument of counsel, upon the attached memorandum brief in support of same attached hereto.

The petitioner, being a pauper without funds or means to retain counsel to defend and prosecute this application before this Learned Tribunal; as a layman, unversed in law and legal procedure, prays that a writ of certiorari issue to review a final order of the Court of Appeals, the highest Court of the State of New York, entered in the office of the Clerk of Clinton County, on the 9th day of October, 1946, dated October 3rd, 1946, denying petitioner's motion for re-argument of his appeal theretofore decided by that Court on the 29th day of May, 1946, which order was entered in remittitur in the office of said County Clerk, on June 5th, 1946, unanimously affirming without opinion the order of the Appellate Division of the Supreme Court for the Third Judicial Department, dated September 11th, 1945 (R. 98), which order was entered in the office of the clerk thereof, September 25th, 1945, and filed in the Clinton County Clerk's office—October 2nd, 1945, affirming Special Term, Clinton County (R. 6, O'Connell, J.) dismissing a writ of habeas corpus previously issued (R. 13), and remanding petitioner to the custody of the respondent herein. The order of Clinton County was entered in the office of the clerk thereof—May 5th, 1945; the notices of appeal herein are found at (R. 1, 11, 96, 98).

It is further prayed for by petitioner upon the attached verified affidavit in *forma pauperis,* that as a Citizen of the United States, this Court appoint counsel, without cost, to defend, prosecute and protect petitioner's constitutional rights which he claims have been violated as hereinafter set forth upon construction of argument.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code of the United States to review by certiorari all questions hereinafter presented of constitutionality previously passed up by this Learned Bench in the cases of: Roberts v. United States, 88 L. Ed. 68, 64 S. Ct. 173; United States v. Murray, 275 U. S. 347 L. Ed. 309, 313 and Hazel-Atlas Glass Co. v. Hartford Empire Co., U. S. Supreme Court, No. 398, decided May 15, 1944, and which petitioner contends the New York State Court of Appeals after granting leave to appeal (R. 102), denied him the "equal protection of the law" guaranteed to him under the 14th Amendment of the United States Constitution (Turax v. Corrigan, 275 U. S. 312, 331, 333), and Art. 1, Sec. 6 New York State Constitution (Shepherd v. The People, 25 N. Y. 406), by the affirmance thereafter of the lower Court upon similar constitutional questions there presented and previously passed upon by that Court in the case of: Matter of Cedar, 240 App. Div. 182, 186; aff'd 265 N. Y. 620. It follows, therefore, in calling for "equal protection of the law" guaranteed under the 14th Amendment, *supra,* this is a petition for a writ of certiorari to be directed to the County Court of Clinton County at Plattsburg, N. Y., to review the final orders of the Court of Appeals of the State of New York, abovementioned, dated and now on file in remittitur as aforesaid in said County Clerk's office.

Summary Statement of Matters Involved.

The case is one of peculiar urgency and of general importance; it is the outgrowth from a previous order of the Appellate Division of the Supreme Court for the Second Judicial Department, rendered February 19, 1940

(R. 44), reported at 258 App. Div. 642 (2nd) 17 N. Y. S. 748, which ordered petitioner herein returned to the sentencing Court of General Sessions of County of New York for resentence—pursuant to Section 1944 of the Penal Law, only; and among other things, petitioner has been denied "due process and the equal protection of the law" in violation of the U. S. Constitution, the 14th Amendment; he is undergoing a judgment of resentence not in accordance with that pronounced in his presence (R. 29), but is an amended judgment made in his absence some time after April 1st, 1941 (R. 48), during the pendency of a previous habeas corpus decision to be discharged (R. 52); that the amended judgment was obtained by trickery and fraud in his absence during the pendency of said habeas corpus decision *supra,* since it fails to show when it was amended, entered and made *nunc pro tunc*"; respondent, as well as counsel (fols. 253, 254), fail to show when it was amended, entered and made "*nunc pro tunc*"; nor does counsel for respondent dispute petitioner's allegations thus presented in the Courts below, in fact, counsel agrees with petitioner's argument, he does, however, state, that if the April 1st, 1941 judgment (R. 29), is illegal and void, the amended judgment (R. 48), is a legal one, and or vice versa, and further relies on Section 2193 of the Penal Law to support his argument that petitioner was protected by the above section with the "good time" earned under the vacated judgment (R. 39); which petitioner hereinafter contends and sets forth that said "good time," is only controlled by Sections 230, 231 of the Correction Laws of the State of New York, as well hereinafter will be disputed in the supporting memorandum brief. For the convenience of the Honorable Court, a copy of said decision reported *supra* at: 258 App. Div. 643 (2nd) 17 N. Y. S. 748, is annexed to the Record (page 68).

Previous Applications.

That, any previous application for a writ of certiorari heretofore made, did not contest the question of jurisdiction of the Trial Court and that of constitutionality; petitioner has been denied "due process and the equal protection of the law" (U. S. Constitution—14th Amendment), and has no other remedy available other than the present application to safeguard and protect his constitutional rights in the matter, and that he will not be deprived of his liberty or compelled to serve a longer term of imprisonment under a void judgment imposed by a Court of incompetent criminal jurisdiction (Johnson v. Zerbist, U. S. Supreme Court, 304 U. S. 465, 548; Hudgson v. Vermont, 168 U. S. 202, 269 and Turax v. Corrigan *supra*).

Opinions in Courts Below.

The Judges of the New York State Court of Appeals, after having determined and granted leave to appeal (R. 102), did not render an opinion in affirming the order of the lower Court, the case is reported at: 295 N. Y. 914; and motion for re-argument has not yet been reported. The Appellate Division of the Supreme Court did likewise in affirming Special Term (R. 105), and is reported at: 269 App. Div. 919; and the lower Court, Special Term, where this action was commenced did no other (R. 88), in rendering the order dismissing writ remanding relator. The final orders of the Court of Appeals together with an affidavit of no opinion are hereto annexed and made a part of this petition; certified copies of originals are submitted to the Clerk of this Court under separate cover—to be submitted simultanously with this application.

Statement of Facts.

Petitioner was originally arrested Feb. 9, 1931 (fol. 106); indicted, Murder 1st Degree March 27th (fol. 102); tried and convicted as charged June 11th (fol. 106), and on June 19th of that year sentenced to death the week beginning July 27th, 1931 (fols. 106, 204). This judgment was reversed and a new trial ordered, Feb. 9, 1932 (Peo. v. Mummiani, 258 N. Y. 394 (fols. 107, 204)). During the course of retrial at a term of the Court of General Sessions *supra*, petitioner on April 8, 1932, pleaded Guilty to Murder in the Second Degree to cover indictment No. 185645 (fol. 205—R. 39, 41); thereafter on April 22, 1932 (R. 39, 41 and fol. 205), was sentenced to State Prison, not less than thirty (30) years, not more than natural life, five (5) years thereof being increased punishment for being armed. Pursuant to an order of the Supreme Court Second Dept. (R. 44), petitioner was returned to the County of New York for resentence pursuant to Sec. 1944 of the Penal Law, *only;* and was committed to the City Prison (fols. 86, 87); the case as aforesaid is reported at: 258 App. Div. 643 (2nd) 17 N. Y. S. 748. On April 1st, 1941, after inquiry and taking of testimony (fols. 87, 88, 89), petitioner adjudges armed; the sentence heretofore imposed on April 22, 1932 (R. 39), of thirty years to natural life, was vacated (fols. 88, 89), and petitioner sentenced to State Prison as April 1st, 1941 (fols. 85, 89, 90), minimum term thirty (30) years, maximum natural life, five (5) years of said minimum term being increased punishment pursuant to Sec. 1944 of the Penal Law for being armed, and the challenge of petitioner as to the jurisdiction of that Court to impose a new second sentence for the crime of murder in Second Degree as of April 1st, 1941 (R. 29), was overruled (R. 32) (Italics mine).

Petitioner was committed and received in the Attica State Prison, on April 4, 1941, and allowed to commence the sen.

tence (R. 29); thereafter, a writ was issued returnable at Wyoming County, State of New York (fol. 150), and during the pendency of the decision thereon, the respondent therein (fol. 149), through the New York State Attorney General, had produced a so-called "Corrected Commitment" (R. 48 and 54), which in all respects read the same as that which had been attached to the return—as that herein (R. 29), except that the Court of General Sessions at some undisclosed date in the absence of petitioner, amended the said void judgment imposed on April 1st, 1941 *supra,* by resurrecting and reinstating the vacated April 22, 1932 judgment, by indorsing and adding at the very end of it in brackets, among other things, the words "***nunc pro tunc*** as of April 22, 1932" (fol. 147). Please to note order and memorandum decision dismissing said writ (R. 50, 52); as well as prison notification before and after resentence (R. 43, 47).

An appeal thereafter from the above order (R. 50), together with the amended judgment (R. 48), was taken to the wrong Court (R. 55, 56, 57), and for the sake of further explanation herein, please to note (R. 60, 62, 63, 64, 65 and 66), the steps petitioner thereafter followed up leading back to this Honorable Body.

Statutes Involved; Remark and Specification of Errors to be Argued.

The pertinent statutes involved herein relating to the judgment petitioner is undergoing which he claims is void for utter lack of jurisdiction, and in conflict with the U. S. Const., Art. "5," will be hereinafter discussed.

It will be noted, that in the Court below petitioner was represented by counsel, one, August Zolotorofe of 26 Court

Street B'klyn, N. Y., who as a member of the Legal Aid has be-friended him without fee through the courtesy of the B'klyn Bar Association: and said affidavit in *forma pauperis* shall in no way be misunderstood that petitioner is financially fixed to retain counsel to prosecute this application; said attorney after noticing that petitioner had prepared and submitted his main brief in the Court below, further prepared, submitted and argued Petitioner Appellant's Supplemental Brief—which Court of Appeals accepted and passed upon—upon consent of the Attorney General of the State of New York, Hon. Nathaniel L. Goldstein who represents the respondent herein, that said questions be reviewed, so that it will be settled matter in the State and stop petitioner from proceeding further thereon. Please to note therein petitioner's retained volume summitted to this Court under separate cover as a loan, Appellant's Supplemental Brief and that in opposition citing cases authorizing that Court to review same upon the appeal.

Thus, since the Court below accepted Petitioner's Supplemental Brief and the questions there and hereinafter presented are the outgrowth from the order rendered thereupon its decision reported at: 258 App. Div. 643 (2nd) 17 N. Y. S. 748, are hereby made a part of this proceeding as hereinafter discussed upon construction of argument.

The Court below erred in affirming the order of the lower Court (R. 98), holding that in Lyons v. Goldstein, 290 N. Y. 19, 47 N. E. (2d) 425, "That a Court of criminal jurisdiction has inherent power"; since, Lyons v. Goldstein is not applicable here when the Trial Court (R. 32), overruled petitioner's challenge, and could not thereafter even under the broad and liberal language of Section 105

of the Civil Practice Act, correct the judgment by amendment in the absence of the defendant because the second sentence was jurisdictionally defective and void, and could not have been corrected by the Court by amendment under said section, authorizing mistake, omission, irregularities or defects to be corrected or supplied, in discretion of the Court; and since habeas corpus proceedings cannot be used for reviewing irregularities and defects thereof which occurred at the time of trial (Johnson v. Zerbst, U. S. Supreme Court, 304 U. S. 465, 548).

The Questions Presented and the Reasons Relied Upon for the Allowance of Writ Herein Petitioned for.

The petitioner asserts that a writ of certiorari should be granted in that the Court of Appeals of the State of New York has rendered a decision in conflict with its previous decisions on the same questions in the Matter of Cedar, 240 App. Div. 182, 186; aff'd, 265 N. Y. 620, and has decided a question of law in conflict with the decisions of this Honorable Court and has deprived the petitioner the "equal protection of the law," guaranteed to him under the Constitution of the United States—the 14th Amendment.

The New York State Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

The Court of Appeals *supra*, has decided Federal questions of substance not in accordance with applicable decisions of this Court, among others, to wit:

a): *Ex Parte Lange*, 85 U. S. 163;

b): U. S. Benz, 282 U. S. 304;

c): Roberts v. United States, 88 L. Ed. 68, 64 S. Ct. 173;

d): *Ex parte* Bain, 121 U. S. 1, 10, 13, 7 S. Ct. 781, 30 L. Ed. 489, etc.

It is a well settled principle of law that the question of substantial right is not the abstract question of guilt or innocence, but that of constitutionality (Peo. v. Sobiskada, (1253), 235 N. Y. 411; Teregno v. Shattuck, 265 Fed. 797). Therefore, the questions presented of supreme importance in this case are:

1): Can a Court of original jurisdiction vacate a judgment entirely (Legally held in part by the App. Div. (R. 68)), and without reference to what has been done under it, impose a new second sentence some nine years later; without violating the provisions of the Fifth Amendment to the Constitution, against putting one in jeopardy twice for the same offense, when part of a sentence against one has been partly executed by a prison term, and the term has ended?

2): Can the said Court after adjournment *sine die* of its term, in the absence of defendant and during the pendency of a habeas corpus decision to be discharged amend a judgment of resentence which is in execution; without violating the statutory provisions of Section 337, 470-a and 471 of the Code of Criminal Procedure, and 2188 of the Penal Law?

3): Can the said Court after overruling defendant's challenge as to the jurisdiction of the Court at the time of sentence amend its judgment thereafter in his absence at some undisclosed date; without violating Section 471 *supra*?

4): Can the said Court contrary to an order of the Appellate Division, take testimony some nine years later and not that of the defendant, in order to determine if defendant was armed during the commission of the felony for which he was punished; without violating the Statute of Limitation, the due process clause and the equal protection of the law of the State and National Constitution?

5): What was a proper record in the foregoing case meant by the order of the Appellate Court (R. 44)?

6): Can Section 1048 of the Penal Law be Constitutional by the sentence herein imposed, when the Court below in its previous decisions held specifically—that second degree murder, the penalty as provided by law *supra*, was "Twenty (20) years to Life"? (Peo. v. Pechota, 240 N. Y. 574, 148 N. E. 710, affirming 209 App. Div. 164 and People *ex rel.* Miresi v. Murphy, 253 App. Div. 441 N. Y. S. (2nd) 731.)

7): Is it not Constitutional that punishment for murder in the second degree *supra*, takes in the gun and all as punishment for the highest felony offense? (Coy v. United States, No. 10112 Fed. (2d) 293, decided January 1st, 1946.)

8): Can Section 2193 of the Penal Law be Constitutional if the judicial upholds interpretation of counsel that said section allows "good time", where the statutes fails to provide such a provision? That provision is contained in Sections 230, 231 of the Correction Law, as hereinafter discussed.

9): Can a County Court of the State of New York in deciding the above issues on a previous application, except insert 2, 3, 6, 7 & 8, above, dismiss the writ on the grounds of newly created evidence, made and produced in the

absence of petitioner during the pendency of its decision thereon to be discharged; without violating the provision of Sections 1251, 1255, 1259 & 1262 of the Civil Practice Act?

10): Can Special Term herein, concede that petitioner was right in his contentions set forth, and yet dismiss the writ at bar upon the grounds of previous application; without violating the statutory provisions of the Civil Practice Act *supra*?

11): Can the Court below decide questions of substance not in accordance with applicable decisions of this Learned Tribunal, affirm the lower Court and simultaneously overrule its previous authority, and thereby deny petitioner the "equal protection of the law"; without violating the decisions of this Honorable Body to be the law of the land?

The New York State Court of Appeals as aforesaid, has decided similar Constitutional questions in the Matter of Cedar, 240 App. Div. 182, 186; aff'd 265 N. Y. 620, and has denied petitioner the "equal protection of the law", by the affirming of the lower Court.

Since it is clear that petitioner has been denied "due process and the equal protection of the law", when the judgment of resentence herein was amended in his absence, the decisions of this Honorable Body in point, prohibits any such whittling away of essential Constitutional rights. (Johnson v. Zerbst, 304 U. S. 465, 548.)

One's right to be specifically informed of his right is a basic right, guaranteed by the due process clause. (Hudgson v. Vermont, 168, U. S. 262, 269). Thus as aforesaid, when the Court below affirmed the order of the lower Court and the failure of the Trial Court to appoint a time for pronouncing judgment in conformity with the written

statute law—Section 471 of the Code of Criminal Procedure, when it amended the judgment in his absence, it denied petitioner "due process and the equal protection of the law", guaranteed to him under the Fourteenth Amendment of the United States Constitution, and the Fifth Amendment—Art. 1, Sec. 6 of the New York State Constitution.

The above Constitutional questions presented are crucial and in petitioner's judgment are the only logical grounds on which he asks leave of this Honorable Body to file this application in his own behalf for a writ of certiorari to end that basic right under the Constitution calling for vindication, if this Country is to preserve its ideal of "equal protection of the law", that, *when judgment is pronounced, the accused must be there present to be heard.* "why judgment should not be pronounced" (Thompson v. State of Utah, 170 U. S. 343 and Frank v. Mungum, 237 U. S. 309, 340), for such deprivation would be a denial of "due process and the equal protection of the law". (Italics mine.)

To deny such application, would further be to deny petitioner "due process and the equal protection of the law" guaranteed under the 14th Amendment,—U. S. Const. and to leave in force provisions of law by which the later will of the Legislature may be thwarted and overthrown. Such a result would render Legislature a useless and idle ceremony and subject to the law to the reproach of uncertainty and unintelligibility.

PRAYER FOR ALLOWANCE OF WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the County Court of Clinton County of the State of New York, commanding that Court to certify and send to this Court, a full and

complete transcript of the Record and all proceedings had in this cause on appeal in the Court of Appeals of the State of New York, titled: People *ex rel.* Mummiani vs. Jackson, Warden of Clinton Prison, for review and determination, on a day certain to be therein named, in the case now Docket No. ...., October Term, 1946; and that upon such a review the order of the Court below denying petitioner's motion for reargument of his appeal theretofore decided, be reversed, the remittitur amended to read, order of affirmance reversed, the writ sustained, and that this case be remanded to the Court of original jurisdiction with instructions to proceed further in accordance with the views of this Court; and it is further prayed for by petitioner upon the attached verified affidavit in *forma pauperis* that a further order issue simultaneously with the writ of certiorari, appointing counsel, without cost, to defend and prosecute this application before this Honorable Court protecting petitioners Constitutional rights in the premises and petitioner for ever prays.

Dated at: Dannemora, State of New York, December 9, 1946.

Respectfully submitted,

VINCENT MUMMIANI,
Petitioner in Pro Per,
Box B. Clinton Prison,
Dannemora, State of New York.

Subscribed and sworn to before me
this 9th day of December, 1946.
Lisle L. Denicore
Notary Public, in and for
Clinton County, State of New York.
Clinton County Official Number 225.

My Commission expires March 30, 1946.
(Seal.)

IN THE

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, VINCENT MUMMIANI, *Petitioner*, against J. VERNEL JACKSON, etc., *et al.*, as Warden of Clinton Prison at Dannemora, New York, *Respondent.*	October Term, 1946—No.

MEMORANDUM BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Nature of Action.

This is a proceeding for a writ of certiorari to review a final order of the New York State Court of Appeals, the highest Court of the State of New York, which denied petitioner's motion for re-argument of his appeal theretofore decided on the 29th day of May, 1946, unanimously affirming without opinion (R. 98), which Court in turn affirmed Special Term (R. 6), dismissing writ of habeas corpus herein and remanding relator to the custody of the respondent. The motion for re-argument was submitted for the purpose of securing a memorandum of law or Court opinion to be used as the basis for an appeal to this Honorable Bench; which motion for re-argument has not yet been reported at this writing and the case had on appeal is reported at: 295 N. Y. 914. Please to note Appellate Court's report at: 269 App. Div. 919, and for the convenience

of the Honorable Court, copies of the orders of said last Court of resort are annexed hereto and made a part hereof.

There were no opinions written by any of the Courts below since the commencing of this proceeding (R. 88, 105 and affidavit of no opinion annexed hereto), and the notices of appeal in these proceedings as well as leave to appeal are found at (R. 1, 11, 96, 98, 102).

Condensed Brief of Argument.

That as heretofore stated, petitioner is representing himself, without argument of counsel and that all the papers submitted by him in support of the application attached for a writ of certiorari have been prepared by him, and that he is thoroughly familiar with all the proceedings had here in the Courts below, and the contents of all papers submitted hereof.

Since the jurisdiction of this Court is invoked under Sec. 237 (b) of the U. S. Judicial Code to review by certiorari all questions hereinbefore presented of constitutionality passed upon the New York State Court of Appeals in the negative, the writ of habeas corpus (R. 13, 15), was brought to question the jurisdiction, power and authority of the sentencing Court at bar to impose a new judgment of resentence in the absence of defendant-petitioner herein, after *sine die* adjournment, which denied petitioner "due process of the law," guaranteed to him under the State and National Constitution—the 14th Amend. (U. S. Const.) (Hudgson v. Vermont, 168 U. S. 262, 269) (Italics mine).

The New York State courts, have uniformly held in: Peo. *ex rel.* Solomon v. Slattery, 1942—Misc.—, 39 N. Y. S. (2d) 43, that the relief herein sought at bar "The writ of habeas corpus is the proper remedy."

That the aforesaid order, as referred to in par. 3 of the application, the said Court of Appeals after having determined and granted petitioner leave to appeal, thereafter denied him the "equal protection of the law" (Turax v. Corrigan, 275 U. S. 312, 331, 333), by passing upon similar constitutional question on the appeal there presented, previously decided by that Court in the Matter of Cedar, 265 N. Y. 620 affirming 240 App. Div. 182, 186; and not in accordance with applicable decisions of this Court, to-wit: *Ex Parte* Lange, 85 U. S. 163; U. S. v. Benz, 282 U. S. 304; Roberts v. United States, 88 L. Ed. 68, 64, S. Ct. 173, by affirming unanimously and without opinion, the decision of the lower Court (R. 98), affirming Special Term (R. 6), O'Connell, J., denying and dismissing petitioner's writ of habeas corpus herein, to compel the sentencing Court of General Sessions of the County of New York, among other things, to vacate and make void the second sentence imposed (R. 29), which vacated and set aside the first sentence (R. 39), as being contrary to the order of the App. Div. (R. 44), and Sec. 2188 of the Penal Law; that the second sentence is wholly without jurisdiction, void and in conflict with Art. "5" of the U. S. Const. (Shepherd v. The People, 25 N. Y. 406; *Ex Parte* Lange, *supra*); as well to vacate and make void a "*nunc pro tunc*" order (R. 48), made in the absence of petitioner during the pendency of the habeas corpus decision (R. 52), as being contrary to law Sec. 471 of the Code of Criminal Procedure; and which constitutes fraud since it fails to show when it was amended, entered and made "*nunc pro tunc*".

That the aforesaid decision of the Court below as aforesaid, was at complete variance with its previous decisions in the following cases:

The question of "*nunc pro tunc*," and the statute controlling the matter at bar, were recently decided by the Appellate Court in: Gerbino v. Ashworth, 265 App. Div. 579.

a): Matter of Cedar, 265 N. Y. 620 affirming 240 App. Div. 182, 186, (which is a leading case on the subject), held: "that the Court of General Sessions is without power to reconsider, vacate, modify or *amend* the sentence imposed * * *." (Italics mine);

b): "That we are bound by the record and not by facts established by any other means * * *". (Peo. *ex rel.* Sloan v. Lawes, 225 N. Y. 112) and

c): In People v. Gormely, 246 N. Y. 583 affirming 225 App. Div. 583, held: "that the action of the Trial Judge, who had the defendant and his counsel and all the facts before him at the time of *re*-sentence, could not disturb the sentence later *in the absence of the defendant after overruling his challenge* (R. 32)". (Italics within quotations are added by petitioner.)

Thus, in consequence of the order rendered in the instant case (par. 3 of the application), the Court below has not only overruled its previous decisions, but as well denied petitioner "the equal protection of the law" guaranteed under the 14th Amendment of the U. S. Const. (Turax v.

The principle of being present "when judgment is pronounced," is a necessary function of law (Thompson v. State of Utah, 170 U. S. 343); and the general rule in New York State as provided by law sec. 471, Code Criminal Procedure is: "if the judgment be not arrested, the Court must appoint a time for pronouncing sentence." (Gerbino v. Ashworth, 265 App. Div. 579).

Even in a civil action, where the person is not deprived of his liberty, the principle of "being present" is a necessary function of law, "when judgment is pronounced." (See Mr. Justice Murphy concurring separate opinion, in William et al. v. North Carolina, 322 U. S. 725, decided by this Tribunal May 21, 1945, there citing the case of Haddock v. Haddock, 201 U. S. 562, recognizing the principle of Mr. Justice Brown's dissenting opinion, stating that: "The Courts of one state *may not grant a divorce against an absent defendant to any person* * * *." (Italics mine.)

Corrigan, *supra*), and the New York State Const., the "5" Amend., Art. 1, Sec. 6 (Pawatt v. Woodworth, 172 Misc. 791 and Peo. v. Simonia, 18 N. Y. (2nd) 371).

In support of petitioner's argument above, to amend in absent defendant and to send a person to prison, and without giving him an opportunity to be heard "why judgment should not be pronounced", violates elementary principles of law and can only leave a sense of rankling injustice in the mind of the petitioner (Peo. *ex rel.*, Stumpf v. Craig, 79 Misc. 98; Peo. v. Hill, 164 Misc. 370). Thus, the case at bar stands on no different foundation than "Haddock v. Haddock," *supra*, in relation to absence of petitioner, when the judgment of resentence was amended.

The Courts cannot create new technicalities to destroy human life and liberty, or destroy or hamper the administration of law (Peo. v. Gowasky, 224 N. Y. 451); and since the decisions of this Honorable Body prohibit any such whittling away of essential Constitutional rights, "to be specifically informed of his right is a basic right guaranteed by the due process clause (Hudgson v. Vermont, 168 U. S. 262, 269)"; petitioner has been denied "the equal protection of the law" (Turax v. Corrigan, *supra*), by the order of affirmance (par. 3, petition), upholding the brazen unauthorized violations of the lower Courts, etc.

Since the Court below in affirming the order (par. 3 petition), accepted petitioner's supplemental brief, and the fact that the same issue therein has been decided in a

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The New York State Courts in: Shepherd v. The People, 25 N. Y. 406, have held that: "A prisoner against whom a wrong judgment was pronounced upon a regular trial and conviction cannot be subject to another trial."

former proceeding should be given controlling weight (C. P. A. Sec. 1234 [7]; Salinger v. Loisel, 265 U. S. 224, 231 (1924); Wong Doo v. United States, 265 U. S. 239 (1924); and for the sake of further argument herein as presented in the application pursuant to Section 1048 of the Penal Law, it is believed that this Court should pass upon the interpretation of the statute, that the meaning of the words "not less" in the minimum term is a fixed sentence of twenty (20) years; wherefore, petitioner leaves the subject to refer thereto in support hereof, the dissenting opinion by Hagarty, J., reported at 258 App. Div. 643 (2nd), 17 N. Y. S. 748, speaking of Sec. 1048 *supra;* Peo. *ex rel.* Miresi v. Murphy, 253 App. Div. 441, 2 N. Y. S. 2d 731, and Peo. v. Pechota, 240 N. Y. 574 N. E. 710 affirming 209 App. Div. 164 which was decided prior to the amendment of 1928, in interpreting Sec. 1048 as it existed prior to 1928. Please to note (R. 68), for 258 App. Div. 643, reported, *supra.*

In short, petitioner further contends, that punishment for murder in the second degree,—Sec. 1048 *supra,* takes in the gun and all as the punishment for the highest felony offense (Coy v. U. S. No. 10112, 156 Fed. (2d) 293, decided Jan. 1, 1946.

In Lyons v. Goldstein, 290 N. Y. 19, 47 N. E. (2nd) 425, and cases there cited, the Court below held: "That a Court has jurisdiction to entertain a motion to correct its record where it appears that a clerical error existed." It was further said in the opinion in that case: "that there

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C. P. A. Sec. 1234—sub-div. 7, "previous adjudication in proceedings by habeas corpus are no answer to a writ, where the relator is restrained of his liberty" (Peo. *ex rel.* Sabbatino v. Jennings, 223 N. Y. 124); "A decision on one writ is no bar to a subsequent proceeding" (*Ex parte* Moebus, 148 Fed. 39, 40); and in *Ex parte* Peeke, 14 Fed. 1016, U. S. Dist. Court, Judge Laney (N. Y.) on page 1017, said: "Where, however, it appears upon the return to a writ that the petitioner is restrained of his liberty by virtue of a judgment made without authority, the petitioner will be discharged." (Sections 1251, 1255, 1259, 1262, C. P. A.)

was nothing in the Code to prohibit a Court from exercising its inherent power to correct mistakes and errors in its judgment." Since this authority is not applicable at bar, let us note the following:

1.

Counsel for respondent contends, that the sentencing Court herein had the power under the authority of Lyons v. Goldstein, *supra,* to amend the judgment of resentence in the absence of petitioner by adding the notation "*nunc pro tunc*" (R. 48), and that even though the Court had not made such notation, petitioner was protected by Sec. 2193 of the Penal Law with all time actually served in state prison under the vacated judgment (R. 29), as well as the "good time" earned thereunder; and further argues, that if the April 1st, 1941 judgment (R. 29), is void for utter lack of jurisdiction; the April 1st, 1941 amended judgment (R. 48). is a legal one, and or the vice versa; and that in any event petitioner should be returned to the original Court for resentence and not discharged.

2.

Petitioner contends, that Lyons v. Goldstein is not applicable here at bar since petitioner's challenge (R. 32), was overruled at the time of resentence; and since petitioner was not protected by Sec. 2193 *supra,* with "the good time" earned thereunder the vacated April 22, 1932, judgment "even if the Court had not made such a notation, the second sentence imposed (R. 29), is void for utter lack of jurisdiction; that since petitioner was committed, received and allowed to commence the second sentence—Sec. 2188 of the Penal Law is under consideration and applicable here, that once a sentence has been put into execution it cannot be disturbed; and since no time was appointed for pronouncing sentence in conformity with Sec. 471 *supra,* the amended judgment obtained in his absence (R. 48), at some undisclosed date during the pendency of a habeas corpus decision to be discharged (R. 52), constitutes fraud since it fails to show when it was amended, entered and made "*nunc pro tunc.*"

That since no motion had been made by the District Attorney of the County of New York, to correct the judgment (R. 29), which could be reviewed and the challenge of petitioner overruled (R. 32), the said Trial Court had full knowledge of its void judgment imposed when it issued the final commitment and allowed petitioner to commence the sentence; that when said Court refused to recognize its own judgment after being called to its attention in conformity with Lyons v. Goldstein, *supra*, "the said Court ceased to exist and ousted of jurisdiction," and could not thereafter in his absence without due notice retake a recognizance during the pendency of a habeas corpus proceeding to be discharged (R. 52), amend its judgment to conform to its personal whim and fancy causing the said writ to be dismissed (R. 50 and fol. 160).

It is true that a writ of habeas corpus cannot be used as a means of reviewing errors and irregularities occurring during trial but it is likewise true that it is the duty of the Court "to preserve—not destroy—constitutional safeguards of human life and liberty" (Johnson v. Zerbst, 304 U. S. 465, 548). Thus when the Court below in the case at bar passed upon evidence of the Trial Court, made in his absence during the pendency of a previous habeas corpus decision, and affirmed the lower Court's order, the constitutional safeguards of petitioner were destroyed.

Since the questions presented as aforesaid, are the outgrowth from an order of resentence rendered on a previous decision in petitioner's favor, it is noteworthy therein (fols. 133, 134), that the Supreme Court, Second Department, ordered petitioner to be returned for determination

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Section 2188 of the Penal Law of the State of New York, provides in part: "Providing, however, that the imprisonment directed by the judgment shall not be suspended *or interrupted after such imprisonment shall have commenced.*" (Italics mine.)

and resentence pursuant to Sec. 1944 of the Penal Law, only; and further held (fol. 208), "that there was no merit in the further contention incidently raised by appellant that the Court was without power to impose a longer minimum term than twenty years." Thus, when the Court of General Sessions (R. 87, 88, 89, 90), contrary to the order (R. 44), created a record after inquiry and taking of testimony for the reimposition of five years pursuant to Sec. 1944, *supra,* and vacated the entire sentence imposed on April 22, 1932 (R. 29), and reimposed a new second sentence for the crime of murder in the second degree, it did so without authority, contrary to law—Sec. 2188, *supra;* and the said Court thereby lost jurisdiction of the subject matter and over the person of the petitioner after overruling defendant's challenge (R. 32), and the judgment of resentence is therefore void.

In returning to argument of counsel thus presented in the Court below in opposition "that even though the Trial Court had omitted the provision '*nunc pro tunc* as of April 22, 1932' (R. 48), that appellant, petitioner herein was protected with the *good time* earned thereunder the vacated judgment under Sections 230, 231 of the Correction Law by Section 2193 of the Penal Law." He is in error. (Italics mine.)

Assuming for the sake of further argument herein, that Sec. 2193, *supra,* was applicable here at bar, could the said Court pursuant to said section, have credited petitioner upon the second sentence (R. 29), as "jail time" aside from the ten years and forty-eight days he had already served in State Prison under the vacated judgment—with Three years and Six months as "good time," which he earn-

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The New York State Courts in Shepherd v. The People, 25 N. Y. 406, have held, that: "A prisoner against whom a wrong judgment was pronounced upon a regular trial and conviction cannot be subject to another trial."

ed under the Ten years and Forty-eight days pursuant to Sections 230, 231 of the Correction Law, which was a discretionary one for conduct and behavior as provided by the provisions of the Parole Laws of the State of New York? To do so would be to declare the "discretionary power" given to Board of Parole, "a mandatory one." Thus, since section 2193 fails to provide such a provision to credit state prisoners who have been returned for resentence *(where the entire sentence was not set aside)*, with "good time," we must therefore determine, not by technical rules or canons of construction, but in the light of the purpose and effects of the statute involved. The meaning which the Legislature intended in Section 2193 of the Penal Law. Hence, since the entire sentence at bar was not reversed or set aside, but returned for determination and resentence pursuant to Sec. 1944 of the Penal Law, only (R. 44); and to interpret Sec. 2193, as counsel for respondent does, and in absence of such differentiation, consider Sections 230, 231 of the Correction Laws; to take this "good time" away from petitioner after he has earned it, would be commonly called a "racket" of the parole system of the State of New York. But behind and beneath all this there is the statute, framed in language too clear for construction. Thus, such construction made by learned counsel for respondent was misleading the Learned Court below as to the intent and purpose of the statute and for this Honorable Body to accept the thesis proposed by learned counsel in his construction of the application of the provision of Sec. 2193, would be to torture not only the English language but also to the plain, clear and concise intention of the Legislature, unconstitutional. (Italics mine.)

Chapter 410, Laws of 1919, now Penal Law—Section 2193, *supra*, has no application at bar. That section in terms, deals with convicted prisoners awaiting sentence *(time spent in City Prison waiting trial and conviction to be calculated as part of the prison term)*, and

It is unquestionably true that when the Trial Court (R. 29), contrary to the order (R. 44), vacated the entire sentence imposed on April 22, 1932, and resentenced him anew for the substantive crime as of April 1st, 1941, and committed him to prison as of said date, it did place petitioner twice in jeopardy after inquiry and taking of testimony, as well undertook to destroy the validity of the indictment found by the People. For a principle quite similar, see: *Ex parte* Bain, 121 U. S. 1, 10, 13, 7 S. Ct. 781, 30 L. Ed. 489; and:

Upon this amended judgment (R. 48), petitioner's conviction rests. This Court will have no difficulty in holding that the amended judgment is no judgment of a Court of

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has no language that it allows "good time" thereunder, or effects a prisoner long since convicted and sentenced who has been returned from State Prison for resentence; unless the entire conviction is reversed and set aside; and that inasmuch as petitioner was returned for determination and resentence pursuant to Sec. 1944 of the Penal Law, only (R. 44); Sec. 2193, is not applicable here, because petitioner was still under the jurisdiction of the Board of Parole undergoing the major crime (legally held (fol. 208)), of 25 years to natural life, which was a discretionary one for the Parole Commission. (Peo. *ex rel.* Welch v. Slattery, 1942—Misc.—, 38 N. Y. S. (2nd) 11), and that decision there supports petitioner's argument here that he was not protected by Sec. 2193 with the "good time" earned under the vacated judgment. (Italics mine.)

The pertinent portion of the provision of section 231 of the Correction Law of the State of New York, as amended by Chapter 902 of the Laws of 1935, up to and including the 1941 Session of Legislature, reads: "That the commencement of the term of imprisonment shall begin on the date *(which was in this case April 22, 1932 (R. 39))*, of *his or her actual incarceration in a State Prison or Penitentiary*" (Italics within quotations are added.)

The matter constituting the judgment should be full, express and certain, and not be maintained by argument or implication; for a principle quite similar, note: Rep. 44 b; 5 Gray, 85. The plea of guilty was of the same effect as a verdict of conviction by a jury. This amounted to a conviction of murder in the second degree, while unarmed (Peo. *ex rel.* Huber v. Kaiser, 206 N. Y. 46; Ford v. State, 162 Ga. 422).

competent criminal jurisdiction, and therefore, petitioner was not properly convicted by the amended allegation, made in his absence at some undisclosed date, which can be assumed as the date April 1st, 1941, being amended, and which notation "*nunc pro tunc*", was probably inserted there by a Court clerk or rubber stamp; and in leaving the subject arriving at its conclusion, petitioner contends:

That, since the Trial Court and the Court below as aforesaid, denied him "due process and the equal protection of the law" (Hudgson v. Vermont, 168 U. S. 262, 269; Turay v. Corrigan, 275 U. S. 312, 331, 333 (1921), in violation of the U. S. Const.—, guaranteed to him under the 14th Amendment, and Art. 1, Sec. 6, N. Y. State Const.) (Peo. v. Simonia, 18 N. Y. (2nd) 371; Powatt v. Woodworth, 172 Misc. 791), and habeas corpus cannot be used as a means of reviewing errors and irregularities accruing during trial (Johnson v. Zerbst, 304 U. S. 465, 548), and the relief herein sought was commenced by habeas corpus which is the proper remedy (Peo. *ex rel.* Solomon v. Slattery, 1942—Misc.—, 39 N. Y. S. (2nd) 43); the second sentence (R. 29), is wholly void and in conflict with Article "5"—U. S. Const. (Shepherd v. The People, 25 N. Y. 406; *Ex parte* Lange, 85 U. S. 163), that since petitioner's challenge (R. 32), was overruled; he was committed, received and allowed to commence the second sentence (R. 47); and since he was not protected by Sec. 2193 as aforesaid with the "good time" earned thereunder the vacated judgment, which was a discretionary one (Peo. *ex rel.* Welch v. Slattery, 1942—Misc.—, 38 N. Y. S. (2nd) 11), "even if the Court had omitted the notation *nunc pro tunc*", (R. 48); Lyons v. Goldstein, 290 N. Y. 19, 47 N. E. (2nd) 425 A. L. R. 1422, is not applicable here after overruling petitioner's challenge (R. 32), and since we are bound by the record (Peo. *ex rel.*

Sloan v. Lawes, 225 N. Y. 112), the amended judgment (R. 48) is void for failing to appoint a time for pronouncing judgment in conformity with Sec. 471 *supra* (Gerbino v. Ashworth, 267 App. Div. 579); and since the second sentence vacated and set aside the first sentence (R. 29) and put into execution (Matter of Cedar, 240 App. Div. 182, 186; aff'd. 265 N. Y. 620), there leaves nothing before the sentencing Court of General Sessions "on which it could hear further evidence or pronounce sentence". (*Ex Parte* Bain, 121 U. S. 1, 10, 13, 7 S. Ct. 781, 30 L. Ed. 489). It follows, therefore:

To deny petitioner a writ of certiorari would be to hold that the Matter of Lyons v. Goldstein *supra,* previously decided by the New York State Court of Appeals went even further than its decision by a closely divided Court "that a Court of Criminal jurisdiction has inherent power to set aside upon motion its own judgment based upon fraud or misrepresentation *of an officer of the State*", (Morhouse-Warden v. Supreme Court of New York, 56 N. E. (2nd) 79, 82), which in effect would then extend that said ruling by holding that any judgment, even in the absence of a defendant, could be set aside and amended. To so hold would be violative of due process as well as to declare Sec. 543 Code Criminal Procedure; 1255 Civil Practice Act and 1943 Penal Law of the State of New York unconstitutional; and there would then be no need for a defendant to take an appeal under Sec. 543, nor any necessity to return a defendant for resentence as a habitual offender under Sec. 1943, or to make a final order pursuant to the provisions of Sec. 1255 Civil Practice Act. In short, to make such a ruling would be to hold that the sentencing Court could "*correct or modify or make any new judgment in the absence of a defendant*", and declare Section 471 *supra,* a useless one. (Italics within quotation marks are added by petitioner.)

In order to confer jurisdiction to a sentencing Court and to protect the welfare and safety of the People of the State of New York, guaranteed under the Constitution of the United States, the precedent established heretofore in Lyons v. Goldstein *supra*, in the Court below, overruling its previous decisions, should be overruled by this Learned Tribunal; the application for certiorari granted, and the principle "providing however, that the imprisonment directed by the judgment shall not be suspended or interrupted after such imprisonment shall have commenced", as provided by the pertinent portions of Sections 470-a, Code of Criminal Procedure, and 2188 of the Penal Law of the State of New York, should be upheld with the dissenting opinion of the Court below in Lyons v. Goldstein *supra*, with the views of this Learned Bench in its previous decisions made and provided in point.

Thus they say with reference to the power of a Court to set aside a sentence (R. 29), legally held in part (fol. 208), and increase it (R. 29, 47), or to amend in absentee R. 48): "it is not difficult to imagine times in which the rule might thus become despotic and most oppressive". (Commonwealth v. Maylay, (1868), 57 Pa. 291.)

The most recent cases cited in A. L. R. Supplemental decisions are: Peo. *ex rel.* K. v. McK., 371 Ill. 190, 20 N. E. (2) 498; People v. S., 371 Ill. 627, 21 N. E. (2d) 763.

CONCLUSION.

Wherefore, your petitioner earnestly prays that a writ of certiorari issue and that he be allowed to present a further and complete brief of argument on the questions involved, previously decided by this Learned Bench in the case of United States v. Benz, 282 U. S. 304, in which case this Court reaffirmed the rules laid down in the case of *Ex Parte* Lange, 85 U. S. 163 (which is a leading case on this subject); and which petitioner sincerely believes that

he will prevail in the argument and succeed in showing that his constitutional rights were violated, unless this Court has overruled its previous decision in the Benz case, *supra.* In the case of Roberts v. United States, 88 L. Ed. 68, 64 S. Ct. 178, this Court distinguished the authority laid down in the Benz case and did not contend that the previous decision in the Benz case was overruled. For this reason alone the petition for a writ of certiorari should be allowed.

Dated at: Dannemora, State of New York, December 9th, 1946.

Respectfully submitted,

VINCENT MUMMIANI,
Petitioner in Pro. Per.,
Post Office Address,
Box B, Clinton Prison,
Dannemora, State of New York.

Copy of Original Order Denying Motion for Reargument.

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals, for the State of New York, held at Court of Appeals Hall, in the City of Albany, on the Third day of October, A. D. 1946.

Present, Hon. John T. Loughran,
Chief Judge Presiding.

THE PEOPLE &c., *ex rel.* VINCENT MUMMIANI,
Appellant,
vs.
J. VERNEL JACKSON, etc., *et al.*, as Warden of Clinton Prison at Dannemora, New York,
Respondent.

A Motion for a re-argument of the above cause, having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A Copy.

RAYMOND J. CANNON,
Deputy Clerk.

(Seal)

(Filed in Clinton County Clerk's office—October 9th, 1946.)

Copy of Original County Court Order.

At a Special Term of the County Court, held in and for the County of Clinton at the Court House in the City of Plattsburg, N. Y., on the 5th day of June, 1946.

Present: Hon. F. Claude O'Connell,
Clinton County Judge.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* VINCENT MUMMIANI,
Relator,
against
J. VERNEL JACKSON, as Warden of Clinton Prison, Dannemora, N. Y.,
Respondent.

County Court Order.

The above named relator, Vincent Mummiani, having appealed to the Court of Appeals pursuant to permission granted by said Court from an order of the Supreme Court, Appellate Division, Third Department, entered in the office of the clerk of that Court on the 25th day of September, 1945, which order affirmed the order of Special Term, Clinton County Court, entered in the office of the Clerk of Clinton County on the 29th day of May, 1945, dismissing the writ of habeas corpus herein and remanding the relator, Vincent Mummiani, to the custody of the Warden of Clinton Prison at Dannemora, N. Y., and said appeal having been argued in the Court of Appeals by Mr. August Zolotorfe, attorney for Vincent Mummiani, relator-appellant, and by Charles F. Steele, Assistant Attorney General, of counsel for the respondent, and the Court of Appeals after due deliberation thereon having ordered and adjudged that

the order of the Appellate Division appealed from be affirmed, and having further ordered that the record aforesaid and the proceedings in the Court of Appeals be remitted to the County Court, there to be proceeded upon according to law;

NOW, upon reading and filing the remittitur from the said Court of Appeals herein and upon motion of Nathaniel L. Goldstein, Attorney-General, attorney for the respondent herein, it is hereby:

ORDERED, that the said order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter:

(Signed) F. CLAUDE O'CONNELL,
(Seal) *Clinton County Judge.*

Copy of Original Remittitur.

Court of Appeals.
State of New York. } ss.:

Pleas in the Court of Appeals, held at the Court of Appeals Hall, in the City of Albany, on the 29th day of May in the year of our Lord one thousand nine hundred and forty-six, before the Judges of said Court.

Witness, The Hon. John T. Loughran,
Chief Justice, Presiding.

John Ludden, *Clerk.*

Remittitur—May 29, 1946.

THE PEOPLE &c., *ex rel.* VINCENT MUMMIANI,
Appellant,
ag'st.
J. VERNEL JACKSON, as Warden of Clinton Prison at Dannemora, New York,
Respondent.
} *Remittitur.*

BE IT REMEMBERED, That on the 11th day of January in the year of our Lord one thousand nine hundred and forty-six, Vincent Mummiani, the appellant in this cause, came here unto the Court of Appeals, in person, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And J. Vernel Jackson, as Warden of Clinton Prison at Dannemora, N. Y., the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. August Zolotorofe of counsel for the appellant, and by Mr. Charles F. Steele of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the County Court, Clinton County there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court, Clinton County before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said County Court before the Judge thereof, &c.

JOHN LUDDEN,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, May 29, 1946. } ss.:

I HEREBY CERTIFY, that the proceeding record contains a correct transcript of the proceedings in said cause

in the Court of Appeals, with the papers originally filed therein, attached thereto.

JOHN LUDDEN,
Clerk.

(Seal)

Entered and filed: 6/5/46.

Affidavit of No Opinion.

To:

The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States at Washington, D. C.

Re: Peo. *ex rel.* Mummiani v. Jackson.

United States of America,
State of New York, } ss.:
County of Clinton.

VINCENT MUMMIANI being duly sworn, deposes and says: That he is the petitioner in the foregoing above entitled application for a writ of certiorari and is confined in the Clinton Prison at Dannemora, State of New York, as inmate #28677; that the Court below—The Court of Appeals of the State of New York before whom the motion for reargument and case was submitted on appeal, wrote no opinion in rendering the orders hereto attached entered in remittitur. The case is reported at 295 N. Y. 914, and motion for reargument has not yet been reported as of date below.

Yours, etc.,

VINCENT MUMMIANI,
Petitioner in Pro. Per.,
Box B, Clinton Prison,
Dannemora, State of New York.

Subscribed and sworn to before me,
this 9th day of December, 1946.
Lisle L. Denicore,
Notary Public, State of New York,
Residing in Clinton County.
Clinton County Official Number 225.
My Commission expires March 30, 1946.

Affidavit in Forma Pauperis.

To:
The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States at Washington, D. C.

Re: Peo. *ex rel.* Mummiani v. Jackson.

United States of America,
State of New York, } ss.:
County of Clinton.

VINCENT MUMMIANI being duly sworn, deposes and says: That, he is the petitioner in the above entitled proceeding and is illegally confined in the Clinton State Prison of the State of New York at Dannemora #28677; he is destitute of means to employ counsel to defend him in this action to prosecute the writ of certiorari in the Supreme Court of the United States; he has made every effort to secure the necessary means for the employment of counsel; he has no property or worthly bonds and has been confined for the past sixteen (16) years, and the only means he has is two and one-half (2½) cents a day he earns in prison under the Slave Act for his daily task; that the cost for the printing of the application hereof and of the records and briefs in the Courts below were met

by his brothers in the Armed Forces overseas; he is a native of the United States of America and a resident of the State of New York, having attended public school #85, Manhattan, New York; that his constitutional rights have been infringed upon by the State of New York, and

WHEREFORE, your petitioner respectfully prays that an order issue out of and under the seal of this Honorable Court, simultaneously with that for a writ of certiorari, appointing counsel—without cost, to defend and prosecute the attached application, thereby protecting petitioner's constitutional rights and that this Court review the questions at issue of constitutional law definitely settled as upon the construction of argument by the petition for the writ of certiorari hereto attached, verified this 9th day of December, 1946, at Dannemora, New York.

Yours, etc.,

VINCENT MUMMIANI,
Petitioner in Forma Pauperis,
Clinton Prison, Box B.,
Dannemora, State of New York.

Subscribed and sworn to before me,
this 9th day of December, 1946.
Lisle L. Denicore,
Notary Public, State of New York,
Residing in Clinton County,
Clinton County Official Number 225.
My Commission expires March 30, 1946.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 844

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* VINCENT MUMMIANI,
Petitioner-Appellant,
against
J. VERNEL JACKSON, etc., *et al.*, as Warden of Clinton Prison at Dannemora, New York,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NATHANIEL L. GOLDSTEIN,
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Attorney for Respondent,
The Capitol,
Albany 1, New York.

WENDELL P. BROWN,
Solicitor General,
PATRICK H. CLUNE,
HERMAN N. HARCOURT,
Assistant Attorneys General,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the respondent in the above entitled cause by the Attorney General of the State of New York, and opposes the petition herein and asks that it be denied.

Statement of the Case.

The petitioner prays for a writ of certiorari to review two orders of the Court of Appeals of the State of New York entered respectively on the 5th day of June, 1946 and the 9th day of October, 1946 in a proceeding upon a writ of habeas corpus.

The order of the Court of Appeals filed June 5, 1946 unanimously affirmed, without opinion, the order of the Appellate Division of the Supreme Court of New York which affirmed, *per curiam,* the order of the County Court of Clinton County dismissing the writ and remanding the petitioner. The order of the Court of Appeals filed October 9, 1946 unanimously denied petitioner's motion for reargument. No opinions were written by the County Judge or the Court of Appeals. The memorandum decision of the Appellate Division is reported in 269 App. Div. (N. Y.) 919.

The Facts

Appellant was indicted on March 27, 1931 for the crime of murder in the first degree on account of a killing with a firearm. He was tried, convicted on June 19, 1931 and sentenced to death. Judgment of conviction was reversed and a new trial ordered (258 N. Y. 394).

During the course of appellant's retrial in April 1932, his plea of guilty to murder in the second degree was accepted.

On April 22, 1932, the Court of General Sessions of New York County sentenced appellant to an indeterminate sentence of not less than thirty (30) years and a maximum of life, five (5) years of the minimum being imposed as increased punishment pursuant to Section 1944 of the Penal Law because in the commission of the substantive crime he was armed.

On February 19, 1940, the Appellate Division, Second Department, ordered that a writ of habeas corpus obtained by relator be sustained and the matter remanded to the Court of General Sessions of New York County for de-

termination, upon a proper record, whether relator was armed within the meaning of Section 1944 of the Penal Law. The opinion of the Appellate Division is reported in 258 App. Div. 643.

After taking testimony and making proper inquiry pursuant to said order that Court found that appellant was armed while committing the crime of murder in the second degree. This was in accord with the testimony upon the first trial that the victim's body was pierced with bullet holes (258 N. Y. 394).

The Court, having remedied the procedural defect, on April 1, 1941 ordered that the sentence of April 22, 1932 be vacated and then reimposed the same sentence. No appeal was taken by the petitioner from the original sentence nor from the correction thereof by resentence but three habeas corpus proceedings, of which this is the latest, were brought by him, all of which resulted in dismissals. The petitioner was physically present in court both upon the sentence and the resentence.

The petitioner previously addressed this Court in December 1941, seeking certiorari. His petitions were Nos. 790 and 791, October Term 1941 and the decisions thereon are reported in 314 U. S. at page 698. At that time he offered the same contentions, allegations and arguments which are contained in his present application. On January 5, 1942, the Clerk of this Court wrote to the Attorney General of the State of New York as follows:

"Dear Sir:

I write to advise you that in the cases of Mummiani v. People of the State of New York, and People of the State of New York, *ex rel.* Mummiani, v. William E. Hunt, as Warden of Attica State Prison, *et al.*, Nos. 790 and 791, October Term, 1941, the Court today ordered—

The motions for leave to proceed further herein *in forma pauperis* are denied for the reason that the Court, upon examination of the papers herein submitted, finds no ground upon which writs of certiorari should be issued.

The petitions for writs of certiorari are therefore also denied.

Yours truly

CHARLES ELMORE CROPLEY, *Clerk*,
By (Signed) H. B. WILLEY
Deputy."

On December 10, 1942, a copy of the Clerk's letter was forwarded to this petitioner.

POINT I.

The Fifth Amendment is restrictive of Federal action only, and is without application to action by the States.

The petitioner, on pages 10, 11 and 12 of his petition, poses eleven questions for the consideration of this Court. Only the first thereof in any way contains a constitutional question, alleging a violation of the Fifth Amendment to the Constitution (double jeopardy).

The principle that the Fifth Amendment is without application to action by the States was announced by this Court more than one hundred years ago and has been adhered to ever since.

Barron v. *Baltimore* (1883), 7 Pet. 243;
Twining v. *New Jersey* (1908), 211 U. S. 78;
Palko v. *Connecticut* (1937), 302 U. S. 319, 322;
Feldman v. *United States* (1943), 322 U. S. 487, 490.

"But for more than one hundred years, ever since *Barron* v. *Baltimore*, 7 Pet. 243, one of the settled principles of our Constitution has been that these Amendments (Fourth and Fifth) protect only against invasion of civil liberties by the Government whose conduct they alone limit."

Frankfurter, J., in *Feldman* v. *United States*, *supra*, p. 490.

POINT II

The Courts of the State of New York have the power to determine and correct erroneous sentences and their action in so doing violates no provision of the Federal Constitution.

The appellant in this case does not seriously dispute that the later indeterminate sentence was the proper sentence to be imposed upon him rather than the previous one. He takes the position that the court, having committed an error in the original sentence, was thereafter wholly powerless to correct the same, and that thus he becomes entitled to his freedom, escaping all punishment for the murder which he had committed, and for which he was tried and convicted.

Although some such astounding result was achieved by the courts of the State of New York at the beginning of the nineteenth century, it has been uniformly held for more than seventy years that an erroneous sentence may be corrected and that the imposition of such corrected sentence does not constitute double jeopardy in violation of the Constitution of the State of New York.

People ex rel. Miresi v. *Murphy*, 253 App. Div. 441, leave to appeal to the Court of Appeals denied 254 App. Div. 800, 278 N. Y. 741.

As we have seen, the Fifth Amendment is not available to the petitioner. Although he vaguely contends that the correction of his sentence in some way violated the provisions of the Fourteenth Amendment, it is entirely apparent that the correction of the sentence did not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," which is the established criterion under the due process and privileges and immunities clauses of that Amendment.

> *Palko* v. *Connecticut, supra,* p. 325;
> *Brown* v. *Mississippi* (1936), 297 U. S. 278, 285;
> *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 105;
> *Hebert* v. *Louisiana* (1926), 272 U. S. 312, 316;
> *Rogers* v. *Peck* (1905), 199 U. S. 425, 434.

Certainly no fundamental principle of justice is offended by having an erroneous sentence corrected by the imposition of a proper one. On the contrary, the principles of justice would be definitely outraged, were the imposition of an erroneous sentence to result in the complete liberty of a murderer. As was stated in *People ex rel. Miresi* v. *Murphy, supra,* p. 444:

> "It would be an amazing doctrine to hold that the law is so helpless, so inadequate to public needs, that a prisoner whose guilt is clearly established should escape punishment merely because the court erred in passing sentence. That is just what relator asserts. We cannot sanction such a contention."

POINT III.

There is no merit in the petitioner's contention that the insertion of the words "*nunc pro tunc*" in the resentence deprived him of a constitutional right.

The insertion of the words "*nunc pro tunc*" in the sentence and commitment under which the petitioner is held was for the benefit of the petitioner and in the interest of clarity, and has resulted in petitioner's minimum sentence expiring in 1951 rather than in 1961. The insertion of these words also make it possible to allow to the petitioner credit for good conduct time earned.

CONCLUSION

It is thought that this cause presents no question within the jurisdiction of this honorable court and that the petition accordingly should be denied.

Dated: January 2, 1947.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
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